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TEST WHETHER AN EMPLOYE IS ENGAGED IN INTERSTATE COMMERCE.

There does not appear to be any strictly technical test as to an employe being or not engaged in interstate commerce, a position reaffirmed in an opinion handed down by the federal Supreme Court on May 1st, 1916, in the case of Chicago, B. & Q. R. Co. v. Harrington, 36 Sup. Ct. 517, affirming Kansas City (Mo.) Court of Appeals.

This case held that a member of a railway yard switching crew employed in switching loaded coal cars belonging to an interstate carrier did not while so engaged come under the federal Employers' Liability Act, though the coal was to be used by locomotives in interstate hauls.

Justice Hughes said, in basing his reasoning on Shanks v. Railroad, 239 U. S. 356, that: "The federal act speaks of interstate commerce in a practical sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, Was the employe at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?' Manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employe of the carrier, while he is mining coal in the carrier's colliery, intended to be used by its interstate locomotives, is not engaged in interstate commerce within the meaning of the federal act and there is no distinction between the two cases."

The Shanks case was in regard to an employe in the machine shop of an interstate carrier for the repair of its locomotives used both in interstate and intrastate commerce. He was injured while engaged in taking down and putting into a new position an overhead countershaft, through which was communicated power to some of the machinery used in such repair work. He was held not to come under the terms of the federal Employers' Liability Act.

Justice McKenna in the Shank case refers to cases in which the employe was held to be engaged in interstate commerce. For example, a car repairer replacing a drawbar in a car *then* in use in such commerce; a fireman walking ahead and piloting a locomotive to be attached to an interstate train through switches; an employe carrying a sack of bolts from a tool car to a bridge which were needed in his work on the bridge of an interstate carrier; a clerk going to meet and mark the cars of an inbound interstate train; a fireman hurrying to take an engine of an interstate train already prepared by him and a brakeman placing intrastate cars of a train on a sidetrack. He then cites the coal mining case, *supra,* as *contra,* and that of an employe engaged in hauling cars loaded with intrastate freight from one part of a city to another.

Thus we see four cases not embraced, as held by the court, within the rulings made the other way.

Pedersen v. Railroad, 229 U. S. 146, was the sack of bolts case, *supra,* and it seems nearer to those on the other side of the line than the others. It is a case that has been very much referred to since it was decided. When employe was injured he was carrying supplies needed in bridge construction. In the Harrington and Shanks cases the employes were carrying materials needed for the running of the trains. In the Pedersen case there was, so to speak, a delivery for a special job; in the other, deliveries were for the general upkeep of interstate traffic. The course of the particular work in the Pedersen case required the doing of a particular, but a necessary thing. Therefore, it was an incident in the work.

Furthermore, we do not think the Pedersen case, strictly considered, was a case of supply at all. It just happened, that this incident of the main work was to supply instanced above as bringing an employe

something needed. Indeed, all of the cases within the federal Liability Act, were necessarily a part of an interstate transaction.

In the cases such as we note as falling the other way, commerce succeeded the doing of the work that was done. It had no particular contemplation in its being done. It more resembled a merchant or a contractor doing something in the way of establishing or maintaining a business. This would not be work in carrying on the business. To sustain the Harrington case, as work in interstate commerce, might, in final analysis, make every teamster by whomsoever employed, come under the federal Employers' Liability Act, especially as it lately has been held, that an employe need not be engaged in interstate commerce to be under the protection of the federal Safety Appliance Act. See 82 Cent. L. J. 385. Of course, the terms of the two acts are to be looked to regarding such a conclusion.

NOTES OF IMPORTANT DECISIONS.

PUBLIC POLICY—STATUTE SPECIFICALLY PROVIDING THAT RIGHTS MAY BE ACQUIRED BY CRIME.—If one might suppose that a statute were specifically to provide that an heir might inherit though he murder his ancestor, the source of inheritance, would it be valid? This question is suggested by opinion in Eversole v. Eversole, 185 S. W. 487, decided by Kentucky Court of Appeals.

This case, going on the theory that a common law principle cannot defeat a statutory right and the principle that one cannot profit by his own wrong, is merely a common law principle, holds, that where a wife kills her husband, by Kentucky statute of descents there is no forfeiture of her statutory rights in his estate.

The court said: "Here we have a case where the legislature has provided in clear and unambiguous language, that on the death of the husband the widow shall have certain property rights in his estate, unless those rights have been barred, forfeited or relinquished. The statutes go further and provide exactly how those rights may be barred, forfeited or relinquished. They contain no provision forfeiting her property rights in case she kills her husband," etc.

When we say our statutes determine public policy on any question, we mean only to say that in so far only as or not the particular question of policy involved is within the power of the legislature. If a statute is unconstitutional it declares no policy whatever. Is it then within legislative power to declare that a crime may be the basis of a right in law? Could a statute declare that open robbery or secret larceny, without any interval of statutory limitation, could create title in the robber or thief? The due process of law clause would interfere in such a case.

We concede it would not as to a case of descent or distribution, but might not the principle, that to reward crime is so contrary to the public welfare clause, that a statute vesting title of property, if one murders ancestor, in his murderer, make it unconstitutional?

It seems to us at all events that there is the same implied exception in a general statute as there is in a particular contract, that it is against public policy for a wrongdoer to profit by his own crime. For discussion of the subject, Murderer Taking Under Will or by Inheritance, reference is made to 80 Cent. L. J. 363.

COMMERCE — EMPLOYERS' LIABILITY ACT.—A distinction not unlike that referred to in the editorial on page 421, supra, is treated by West Virginia Supreme Court of Appeals in the case of McKee v. Ohio Valley Electric Ry. Co., 88 S. E. 616.

In this case it is held that the ruling in Pedersen v. D. L. & W. R. Co., 229 U. S. 146, Ann. Cas. 1914C, 153, which decided that a workman engaged in work on a bridge of an interstate railroad and at the time of his injury carrying a sack of bolts to be used in such work, was under the Employers' Liability Act, did not cover the McKee case.

In this case the plaintiff was killed while working in an excavation made for an abutment of a bridge intended to take the place of a trestle used by an interstate railroad. The Pedersen case, it is conceded, would cover injury in the repair of the trestle, but not for injury in the construction of what would take its place.

It was said the plaintiff's "work did not pertain, extend to, nor touch the girders, the original trestlework, the track, the cars, nor anything else then actually used in transportation. Nor was the purpose of the work on which he was engaged a temporary structure or work designed to release or extricate interstate trains, cars, shipment or traffic from obstruction or blockade, or to restore interstate traffic or

transportation that had been interrupted or temporarily discontinued by accident or otherwise."

There is referred to C. & P. S. R. Co. v. Sauter, 223 Fed. 604, 139 C. C. A. 150, as showing that two roads joined in erecting a temporary bridge to restore interstate traffic, and employe killed in such work was allowed to recover. It was said that, if this case "were binding authority, the circumstances brought the workman into closer relation with interstate than that of decedent in this case."

We perceive no very great distinction in the two cases. The building of a bridge to take the place of trestlework is but to improve the road and it ought not to make much difference whether the bridge was intended for a permanent or a temporary structure. Either work is incident to the keeping in repair an instrumentality of interstate commerce. The application or not of the federal act should not be made to depend on the intent of the builders of the improvement, when it is an improvement of that instrumentality. Suppose the trestle had fallen down during the progress of the work on the bridge, would not by that fact the work become close enough to be under the federal act? If new rails of better quality are being put into a track, would not the placing of them be work bringing workmen under the federal act?

SALES—EXTENSION OF RULE AS TO POISONS, EXPLOSIVES, ETC.—New York Court of Appeals holds that the principle making the manufacturer or seller of goods liable for injuries for defects, where the nature of the thing sold makes it dangerous, whether the injury happens to the immediate or other vendee, should be extended when the nature of the thing is such that it is reasonably certain to place other persons in peril, when an article sold is negligently made. McPherson v. Buick Motor Co., 111 N. E. 1050.

The facts in this case show that a manufacturer sold his vendee, who sold to plaintiff, an automobile with a wheel made of defective wood, so that its spokes crumbled into fragments and the wheel collapsed, injuring plaintiff. There is no claim that defendant knew of the defect, but there is evidence it could have been discovered by reasonable inspection, which was never made.

The New York Court speaks of the rule about articles inherently dangerous, and says: "If the nature of the article is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

One of the well known cases rejecting the extension claimed is that in which the opinion was written by Judge Sanborn in Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303. This and other cases consider the danger to others as remote, and in some of them a manufacturer who was merely, or to some extent, an assembler of parts, was held entitled to rely on the established reputation of others from whom he purchased the parts.

There was a dissent by one member of the New York Court, but he holds that the rule which the majority thinks ought to be extended should be thus by the legislature and something should be allowed to precedent. The rule as extended, however, seems very reasonable indeed. If defects are conceded and they make a safe-appearing machine inherently dangerous, it ought to weigh greatly, that as a fit machine it is not thus.

JUDICIAL COURTS OF INQUIRY*—THE ANTIDOTE FOR THE RECALL OF JUDGES.

Wherever life tenure prevails there is need of a speedy, simple, inexpensive manner of preferring and answering charges concerning the conduct of judges. It is incompatible with American manhood that the people will rest content under the belief, whether or not justified, that any official or man is beyond the reach of the law. Impeachment should be made to fit the crime instead of being the plaything of politics or a club in the hand of spite and it should not be the only way of bringing a life tenure judge to judgment. It is too often

*Mr. Thomas W. Shelton, the author of the suggestion of Judicial Courts of Inquiry, is the efficient chairman of the American Bar Association Committee on Judicial Procedure. His plan for reforming proceeding by having the Supreme Court of the United States prepare a code of procedure at law for the federal courts was enthusiastically adopted by the Association and likely to be adopted at the present session of Congress.

the case that the layman, through ignorance of the law, and the lawyer through indifference or fear, has reached the conclusion that a life tenure judge is out of the reach of the man without influence. Resentment and opposition to the plan naturally followed upon the heels of this conviction. The public is becoming like the man who kept fire out of his residence and died of pneumonia because of the fear of burning up his house. It is more sensible to keep the fire under control and profit by it. Some sort of a solution of this problem must be promptly had in order to appease a very respectable number of people.

I propose as a solution a Judicial Court of Inquiry, the prototype of which may be found in military law. A limited example and complete justification of it has recently been furnished by a Congressional Committee of Inquiry in the Archibald case. While the principle is right, the practice is wrong and expensive, as conducted by Congress. When, in the opinion of the Chief Justice, sufficient cause is shown upon a verified petition or communication to that effect, provision should be made by Congress for the immediate selection by the Chief Justice of a Court of three to five judges to hear the case. The *personnel* should be made up of presiding judges of equal or superior dignity and from different grand divisions of the country, who could in no way profit by the outcome and who would represent every ethical viewpoint. Charges and specifications should be prepared and served in advance and the accused should be required to appear in court in person at a public hearing held where the alleged improper conduct was committed.

Before such a court there could be defined and considered the trinity of evils that destroy the usefulness of judges—*corruption, ignorance* and *subserviency*—for conduct could be analyzed and motives exposed. This court could not impeach, but the result would be the same. Congress would respect the findings. The effect would bring to the great body of the people the consoling and peaceful thought that an improper judge was speedily within their reach and it will do much towards, if it does not entirely allay, the dangerous expediency of the recall of judges. The expense of this court would be negligible, its selection would be ideal, its effect would be as wholesome as its prototype is in the army and the National Guard and there would follow a peace and contentment that is the concomitant of faith and respect and the realization of the power of self-protection. I venture to suggest that dissatisfaction with judges is not the outgrowth of honest decisions of big matters, in the absence of questions of political significance, because the average man is a good loser where he has had a fair chance, but it is on account of the aggregation of little things of which the press never hears and under which the complainant, chafing in impotent helplessness, sows the seed of dissatisfaction that needs but little demagogic fertilization to germinate into a governmental menace.

Judges should not remain upon the bench after impairment of their efficiency through age, disability or lack of temperament, particularly when they may be retired on pay. Such conduct would not be permitted in an industrial establishment where men are creating property; how incomprehensible that it should be permitted in jurisprudence where men seek to preserve it! A bill authorizing the appointment of "supernumerary" or additional judges is pending before Congress and ought to be promptly enacted into law by a non-partisan vote, to the end that the orderly conduct of certain federal courts may no longer be suspended.

With the right in the judge to demand an inquiry and the power in the citizen and the lawyer alike to prefer charges, an ever fair-minded public will not permit of the irresponsible mongering of scandal or unguarded expression of criticism. It will go out of fashion to speak loosely of courts and it will come into fashion to lay charges where justified.

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THE "LAST CLEAR CHANCE" DOCTRINE

The doctrine or rule attempted in a measure to be defined by the expression "Last Clear Chance" was first given that name or title by Mr. Thompson in his work on Negligence.[1] The term was applied by him to a rule deduced in Sherman and Redfield, stated as follows:

"The party who has the last opportunity of avoiding the accident is not excused by the negligence of anyone else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury."

Modifications of and exceptions to this rule, as well as rules for testing the applicability of the rule, and the rule itself, have been variously referred to by different courts and text writers as the "Last Clear Chance" doctrine, or the "Humanitarian" doctrine, or the doctrine of "Prior and Subsequent Negligence."

This so-called doctrine is of no concern in jurisdictions where the doctrine of comparative negligence prevails, as in Georgia by statute; or in cases falling within the Federal Employers' Liability Act, or other statutes modifying the common law rule of contributory negligence. For the doctrine is nothing if it is not a modification of or exception to the common law rule of contributory negligence; although in some cases the courts, apparently unable to adjust the common law rule of contributory negligence to the right of the case, have endeavored to apply the doctrine without impairing the general rule and have been led into the error of attempting to reconcile the two doctrines.

There are two elements which go to make up contributory negligence: (1) A want of ordinary care on the part of the plaintiff, or person killed, and (2) A proximate connection between this want of care and the injury.

If this latter element is always kept in mind, the doctrine is free from the criticism sometimes advanced, that under it any degree of negligence, however slight, on the part of the person injured, bars a recovery.

The rule is stated by Judge Cooley, in his work on Torts, (page 674), to be:

"If the plaintiff or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequence of defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant nor will it attempt any apportionment thereof."

As was said by the Supreme Court of Pennsylvania in Penn. R. Co. vs. Aspell:[2]

"It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties."

The reason of the rule is that a party ought not to be compensated at the expense of another for an injury to which his own negligence has contributed.[3]

The Supreme Court of Tennessee, speaking with reference to the doctrine announced in Butterfield vs. Forrester, said:

"This rule has never since been doubted or denied and that case has been cited with approval in every jurisdiction where the common law prevails. It rests upon the ground, first, that it would be a violation of correct principle and sound policy to visit the consequences of the plaintiff's own recklessness upon the defendant where both are directly at fault, and, second, the impracticability in such a case of apportioning the effects of the concurrent negligence so the plaintiff will recover alone for that of the defendant."[4]

With this emphatic and well established rule of law in mind, it is quite difficult to conceive any place for the doctrine of the "Last Clear Chance" within the domain of facts where the principle of contributory negligence is applicable at all. We are, therefore, forced to the conclusion that the courts which have applied the "Last Clear Chance" doctrine have done so either by misconceiving the extent of the doctrine of contributory negligence or by unqualifyingly

(1) Sec. 240.

(2) 23 Pa. 147.

(3) Little Schuylkill Navigation R. etc., Co. v. Norton, 24 Pa. 469.

(4) Railroad v. Williford, 115 Tenn, at p. 119.

repudiating it. But we cannot fail to recognize the fact that the doctrine of the "Last Clear Chance" has grown in favor with the courts as expressing a principle which relieves the harshness of the doctrine which in cases of concurrent negligence, makes the injured party bear all the loss. This tendency of the courts is doubtless due to the sentiment which inspired or resulted from, the enactment of laws adopting the theory of comparative negligence. However, the courts have more frequently commended the doctrine than they have applied it, due to the infrequency of cases where it can be said that plaintiff's negligence was not equal to that of the defendant.

The doctrine has never been applied to any case in Tennessee found in the reported decisions of the Supreme Court, although it has been invoked in many and recognized *obiter dicta* in a modified form.

In Railroad vs. Roe,[5] the application of the rule was denied upon the ground that the plaintiff's negligence contributed directly to the injury. The answer made by the court to the contention of the plaintiff that the rule was applicable is that such a rule is applicable only where the negligence of the defendant is the proximate cause of the injury, or where it indicates wantonness; that where the defendant is held liable its conduct must be taken out of the domain of mere negligence and be of such magnitude as to be characterized as reckless, wanton, or willful.

In Railroad vs. Williford[6] it was held that the doctrine has no application whatever where the negligence of the plaintiff was a contributing cause of the injury. The doctrine as announced in Davies vs. Mann was construed to apply only where the negligence of the defendant was proximate and that of the plaintiff remote. The language of the court on this point is:

"This is but the application of the doctrine, well settled, that where the negligence of the defendant is proximate and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not altogether without fault. A reading of the opinion in the Davies Case makes it entirely clear that the facts raised the question of remote negligence on the part of the plaintiff and proximate negligence on that of the defendant, so plaintiff was given a recovery."

The court quoted with approval the language of Judge Day in Gilbert vs. Erie Co.:[7]

"We do not think the principle settled in these cases applies to the case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant."

The Williford case further establishes the proposition that this doctrine cannot be applied where the defendant is without consciousness that his conduct will probably lead to wrong or injury. It is said:

"Nothing short of actual knowledge of the situation, and an omission of preventive efforts after such knowledge, and where there is a reasonable prospect that such effort will avail 'can suffice to avoid the defense of contributory negligence on the part of or imputable to the injured party.'"

In Grigsby & Co. vs. Bratton,[8] it is held the doctrine does not apply unless the negligence of the plaintiff had expended itself before the intervention of the defendant's negligence and was continuous to the instant of the accident. Upon this point the court said:

"If, notwithstanding defendant's fault, plaintiff's negligence so continued and contributed to the accident, then either the negligence of the parties was concurrent or else the plaintiff himself is to be held as having had the opportunity of avoiding the injury, and his contribution is, in either event, not remote in the chain of causation."

A recent case in Tennessee introducing some novel ideas in connection with this doctrine is Todd v. C. N. O. & T. P. Railroad Co.[9] In that case the court said:

"The decided and well nigh overwhelming weight of the American adjudications is against Davies v. Mann except as that case may be deemed to have announced the doctrine of discovered peril and the duty imposed on a defendant as to his acts after

(5) 118 Tenn. 601.
(6) 115 Tenn. 108.
(7) 97 Fed. 747.
(8) 128 Tenn. 602.
(9) 185 S. W. 62.

a consciousness thereof. * * * In our view Davies v. Mann, as applied to its or equivalent facts, should be translated to relate if to successive acts, then to successive conscious acts of misconduct. * * * Where the acts of misconduct or negligence on the part of plaintiff and defendant are not successive but simultaneous, or the act of the plaintiff may not be conceived of as terminated as a causal factor there should be no recovery."

A novel feature of this opinion is the reasoning by which it arrives at the conclusion that in certain exceptional cases the doctrine is not to be limited to subsequent acts of negligence. It is said that public policy will force a modification of the normal conception of causation and in disregard of logic or actual causation conceive the negligence of the plaintiff to be remote. This rule of public policy is said to operate where the defendant is engaged in a business hazardous to the public and where the duty of the defendant is continuous to anticipate that others may negligently subject themselves to peril from the defendant's control of the instruments of danger. The language of the court on this point is:

"Such a defendant is precedently and continuously to the moment of injury under the duty of lookout for the other, and his or its negligence in failing to discover the exposure of such a plaintiff and averting injury by the exercise of ordinary care, is on grounds of policy considered to be the proximate cause. The law in such case conceives of the negligence of the plaintiff as being remote, it may be in disregard of logic or of actual causation. It is assigned that status by reason of the policy of the law, though it may be that from the standpoint of actuality of cause, the plaintiff's negligence is concurrent with the defendant's up to the moment of injury."

The reason given for making this arbitrary exception seems to be:

"Society is not always unconcerned as to whether the conduct of its members shall reach the standard of due care erected by the law; and that standard may tend to be attained by the assistance to be given or refused by society's judicial functionaries."

In support of this theory the court cited Teakle v. San Pedro, etc., R. Co. [10] and the opinion of Ladd, Judge, in Bourrett v. Chicago, etc., R. Co.[11] Neither of the cases supports the idea of attributing this illogical conclusion to the policy of law. They proceed upon the theory advanced by Mr. Thompson in his work on Negligence, 2nd Edition, sec. 232, where he holds that the plaintiff cannot be charged with contributory negligence when the person inflicting the injury was under duty of exercising care to discover the exposed situation of the person receiving the injury. Without giving any particular reason for this, he states the rule as a test apparently because it has merit of leading us out of difficulties and preventing confusion. The Tennessee Supreme Court evidently feeling the necessity for giving a reason for adopting so illogical a rule, excuses it upon the ground of public policy which considers that as the sole proximate cause, which in reason and in fact, is only concurrent. An examination of the Utah case and the opinion of Judge Ladd, and other cases in line with them, will show the misconception of the Tennessee Supreme Court of the principle held to be controlling. In each instance before defendant can be held liable for the failure to discover the plaintiff's peril and the plaintiff be excused for his negligence by reason of being remote, not only must his negligence have culminated before the injury but intervening between that and the injury, the defendant must have been guilty of some breach of duty then owing to the plaintiff; or in other words, there must have been a breach of duty upon the part of the defendant continuing or intervening after the commission of the plaintiff's contributory negligence before defendant can be held liable upon this theory by reason of its failure to ascertain the plaintiff's peril. In the Utah case, even as thus modified, the rule was held not to apply to a trespasser and in all cases there must have existed a breach of duty after the commission of the contributory negligence of the plaintiff.

It was upon this theory that the Supreme Court of North Carolina applied the doc-

(10) 32 Utah 276, 10 L. R. A. (N. S.) 486.

(11) 152 Iowa 579, 36 L. R. A. (N. S.) 964.

trine in Carter v. Southern Railway Co.[12] the continuance of the plaintiff's negligence

Otherwise interpreted these cases ignore up to the very time of the accident and would be an absolute repudiation of the doctrine of contributory negligence in the face of the claim made in the cases that the principle applied recognizes the common law on this subject. But the court in the Todd case refused to apply this arbitrary rule, said to be laid in reasons of public policy, for the reason that the evidence showed the plaintiff was himself guilty of gross negligence and recklessness in being upon the railroad track. The court said:

"Nor may a plaintiff who is acting so recklessly as to be in utter disregard of his own safety be heard to invoke the application of the principle above discussed. The law will refuse to impose in his behalf any other than the doctrine of actually discovered peril. His negligence is considered to be proximate in causation."

The Supreme Court of North Carolina has adopted the interpretation given by Mr. Patterson in his work on Railroad Accident Law to this rule that 'it means only that that negligence upon the part of the plaintiff which bars his recovery from the defendant, must have been a proximate cause of the injury and that it is not a proximate but only a remote cause of the injury when the defendants notwithstanding the plaintiff's negligence by the exercise of ordinary care and skill have avoided the injury."[13]

In applying this rule to accidents upon railroads, the court, in the case just cited, illustrates the rule by the following example: If A, in unconscious peril, is on the track and if the engineer is negligent—that is, fails in the exercise of ordinary care to discover him until he had reached a point where no effort on his part can avert the collision, and if he, A, fails to look and listen and is run over and injured, his negligence is not concurrent merely but subsequent to that of the engineer and, therefore, he cannot recover because he, and not the engineer, had the last clear opportunity to avoid the accident; but if A, while on the track, and before the decisive negligence of the engineer, becomes so entangled that he cannot extricate himself in time to avoid the collision and his helpless condition could have been discovered by the exercise of ordinary care, then A's negligence would be previous to that of the engineer and he could recover because the engineer had the last clear opportunity of avoiding the injury. It is also held in this case that the mere failure of the engineer to exercise ordinary care in discovering persons on the track, does not make his conduct so willful and wanton that there can be no contributory negligence.

In Southern R. Co. v. Bailey,[14] the court declined to apply the doctrine as laid down in Smith v. N. & S. R. Co.[15] because it appeared that the plaintiff, up to the moment of the accident, could have placed himself in a position of safety if he had exercised ordinary care, although the defendant, by the exercise of like care, could have avoided inflicting the injury. This case, however, recognizes that the negligence of the person injured becomes the remote cause or mere condition of the accident where those in control of the train should have discovered a person upon the track provided the circumstances brought to their knowledge are sufficient to put a reasonable man upon his guard that the person upon the track will take no step to secure his own safety.[16]

The rule applicable to cases such as we have been discussing deducible from the best reasoned cases is this: If at the time of the injury one of the parties could and the other could not, by the exercise of ordinary care, avoid the injury, then the responsibility is on that party that could have avoided it; for the duty of avoiding an injury is on both parties when it is known to be probable and if only one is negligent, that one is responsible, but if both have the ability

(12) 135 N. C. 498.
(13) Smith v. Norfolk & S. R. Co., 114 N. C. 720, 25 L. R. A. 289.
(14) Va., 67 S. E. 365.
(15) Supra.
(16) 27 L. R. A. (N. S.) 385.

to avoid it and neither does, then the one seeking damages must be repelled. This view of the doctrine is sustained by Dyerson v. Union Pacific R. Co.,[17] Green v. Ry. Co.,[18] and French v. Grand Trunk R. Co.[19]

In the French case it is said that while, when a traveler has reached a point where he cannot help himself and vigilance on his part will not avert the injury, his negligence in reaching the position becomes the condition and not the proximate cause of the injury, yet if when he reaches the point of collision he is in a situation to help himself and by a vigilant use of his eyes, ears and physical strength, and could have extricated himself and fails to do so, his negligence at that point will prevent a recovery notwithstanding that the trainmen could have stopped the train in due season and have avoided the injury.

In the Kansas case, just cited,[20] it is said:

"The test is, what wrongful conduct occasioning an injury, was in operation the very moment it occurred, or became inevitable; if just before that climax only one party had the power to prevent the catastrophe and he neglected to use it, the legal responsibility is his only if, however, each had such power and each neglected to use it, then their negligence was concurrent and neither could recover against the other."

The limits of this article will not justify reference in detail to others of the many cases dealing with this subject. Enough have been referred to present most of its phases. Other cases and annotations of interest will be found cited in the note.[21]

L. D. SMITH.

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(17) 74 Kan. 528.
(18) 143 Cal. 40.
(19) 76 Vt. 446.
(20) 7 L. R. A. (N. S.) 140.
(21) Bogan v. Carolina C. R. Co., 129 N. C. 154, 55 L. R. A. 418; Drown v. Northern O. T. Co. Ohio, 81 N. E. 326, 10 L. R. A. (N. S.) 421; Smith v. Connecticut R. & L. Co., 80 Conn. 268, 17 L. R. A. (N. S.) 707; Neary v. Northern P. R. Co., 37 Mont. 461, 19 L. R. A. (N. S.) 446; Atchison T. Etc., R. Co. v. Baker, Kan., 21 L. R. A. (N. S.) 427; C. & N. R. Co. v. Hawkins, 98 C. C. A. 443, 26 L. R. A. (N. S.) 309; Wilson v. I. C. R. Co., Iowa, 34 L. R. A. (N. S.) 687; Bourrett v. Chicago & N. W. R. Co., Iowa, 36 L. R. A. (N. S.) 957; Long v. Pac. R. & N. Co., Ore., 58 L. R. A. (N. S.) 1151; Cent. L. J., March 10, 1916; 82 Cent. L. J. 173.

FOREIGN CORPORATION—BLUE SKY LAW.

STATE v. AGEY.

Supreme Court of North Carolina. May 3, 1916.

88 S. E. 726.

There is nothing in either the federal or state Constitution which prohibits the state, in the exercise of its police power, in order to prevent fraud and imposition, from requiring a license from foreign corporations doing business in the state, by offering for sale its obligations as evidences of property or investments.

CLARK, C. J. The defendant is indicted under Revisal, § 4805, and chapter 196, Laws 1911, and chapter 156, Laws 1913, being § 4805a of "Gregory's Supplement" (amending said Revisal, § 4805), known as the "Blue Sky Law."

Upon the special verdict the court was of opinion that the defendant was guilty, and the jury so found, and from the judgment thereon the defendant appealed.

The special verdict finds that the foreign corporation represented by the defendant is authorized under the laws of the State of Tennessee to buy and sell real estate, and that it has bought large tracts of land in Tatnall County, Georgia, which it has divided, and is selling these tracts of land for fig orchards, and in some instances is contracting to furnish and set out fig trees on said tracts for a stipulated period of time, and has not obtained a license so to do of our insurance commissioner.

The indictment and the special verdict, which are set out in full, present two questions: (1) Whether such contract is within the provisions of the statute. (2) If so, is the statute invalid as a regulation of interstate commerce?

As to the first proposition, chapter 196, Laws 1911:

"Before any bond, investment, dividend, guarantee, registry, title guarantee, debenture or such other like company (not strictly an insurance company as defined in this chapter) or any individual, corporation, or co-partnership who shall by agents offer for sale or sell the stocks, bonds, or obligations of any foreign corporation, whether organized or to be organized or being promoted, shall be authorized to do business in this State, it must be licensed by the insurance commissioner, which the commissioner is authorized to do when he is satis-

fied that such company or corporation is safe and solvent, and has complied with the laws of this State applicable to fidelity companies and governing their admission and supervision by the insurance department. If such company is chartered and organized in this State and has its home office within the State it may, if a stock company, commence business with a capital stock of twenty-five thousand dollars; Provided, it is solvent to the extent of not less than fifteen thousand dollars. The license issued to such companies and their agents shall be issued and paid for as provided for those of insurance companies."

Section 4805a, subsection 1 (chapter 156 of the Public Laws of 1913), provides:

"Every corporation, company, co-partnership or association, all of which are in this act termed company, organized, proposed to be organized, or which shall hereafter be organized, without this State, whether incorporated or unincorporated, which shall in this State sell or negotiate for sale any stocks, bonds or other evidences of property, or interest in itself, or any other company, all of which are in this act termed securities, upon which sale or proposed sale the whole or any part of the proceeds are used, or to be used, directly or indirectly, for the payment of any commission or other expenses incidental to the organization or promotion of any such company, shall be subject to this act."

The question, therefore, is whether the company represented by the defendant is an "investment" company, or whether the defendant was offering for sale the "obligations of any foreign corporation," within the meaning of § 4805, or whether the defendant as the agent of the foreign corporation, was offering for sale in this State "evidences of property, or interests in its or in any other company," within the meaning of § 4805a.

In addition to the parts of the special verdict referred to, it appears from the exhibit, which was made a part of the special verdict, that in an application of a prospective purchaser, the following stipulations appear:

"In event of death of purchaser hereof, warranty deed will be delivered to his or her estate, provided payments are not in arrears.

"The company guarantees to scientifically develop, cultivate, prune and take care of said orchard plot or plots for five years, and upon completion of the payments as above set forth, to make, execute and deliver to the purchaser hereof a general waranty deed for the number of plots mentioned above, which shall have at that time 200 living trees thereon." And—

"The company guarantees the purchaser hereof three cents per pound for all fruit grown on said trees delivered at the preserving plant in good condition."

It will be apparent from the facts set out in the special verdict that the contract offered by the defendant for his company comes within at least three provisions of the statute. It is an "investment company," offering to the public an investment in lands and fig orchards in Georgia. It is also offering the "obligations of said corporation" to cultivate said land and giving its contract to make title on compliance with certain terms, and, lastly, it is offering for sale within the terms of Laws 1913, c. 156, such "evidences of property." Under all three of these provisions it is within the scope of the act.

This transaction took place entirely within the State of North Carolina and is subject to the police power of this State. There can be no interstate commerce, unless as a part of the transaction there is in contemplation some act of transportation between two or more States. In this case the defendant was selling to a citizen of this State an obligation to make title to a certain small lot of land in Georgia. There is nothing to be transported either from this State to Georgia or from Georgia to this State. There is no element of interstate commerce involved. Paul v. Virginia, 75 U. S. (8 Wall.) 168, at page 183, 19 L. Ed. 357.

The intent of the statute is to protect our people, under the police power, from fraud and imposition by irresponsible nonresident parties. These instances have been so frequent that the United States Post-Office Department has estimated that the people of this country have been losing annually more than $100,000,000 by speculative schemes which have no more substantial basis than so many feet of "blue sky."

To prevent such impositions on its people is an essential duty of government. If there is fraud and imposition in a case of this kind the parties imposed on can rarely go to Georgia and hunt up the guilty party, even if to be found there, and undergo the expense incident thereto. Even if this could be done, there would rarely be any assets which could be applied to the demands of the plaintiff. This State has sought to protect its people, not by forbidding such transactions, but by the very reasonable requirement that when parties, whether incorporated or not, acting under the authority, actual or merely asserted, of an-

other State, propose to do business in our borders they must submit their statement of assets, and the nature of their business to the insurance commissioner of this State, who will issue his license to do business here when he "is satisfied that the company or corporation is safe and solvent and has complied with the law of this State applicable to fidelity companies and governing their admission and supervision by the insurance department" and making it indictable to transact such business in this State until such license has been obtained. This is a reasonable requirement under the police power of this State.

NOTE—*Are Stocks, Bonds and Securities Subjects of Interstate Commerce?*—The instant case takes the position that an investment company offering in North Carolina its obligations to cultivate lands in Georgia does not deal with a subject of interstate commerce and, therefore, may be under the regulatory control of the State law where its obligations are offered for sale.

In Bracey v. Darst, 218 Fed. 482, 495, it is said: "We do not think it can be longer questioned that stocks, bonds, debentures and other securities are subject-matters of interstate commerce." There are cited to this proposition a number of Supreme Court cases and Compton v. Allen, 216 Fed. 537.

Compton v. Allen, *supra*, quotes from Ala. & N. O. Transp. Co. v. Doyle, 210 Fed. 173, where it is said: "We cannot doubt that stocks and bonds are now the subject of interstate commerce and that shipments and sales of them between the States, are interstate commerce. We do not find that this has been expressly held in any authoritative decision, but in the present development of commerce it would be regarded as obvious save for the argument based upon Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992 (involving foreign bills of exchange), and Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (involving insurance contracts)."

This court further says: "Under the many decisions from the Supreme Court since that of Nathan v. Louisiana, holding foreign bills of exchange, and Paul v. Virginia, holding insurance policies, not subjects of interstate commerce, we have no doubt but that court when presented with the question, will declare such securities and property rights, negotiable and otherwise, as are sought to be regulated by the act in question, are proper subjects of interstate commmerce."

All of this seems a very extraordinary statement, especially in view of the oft-repeated reaffirmance of Paul v. Virginia, *supra*. If anything may be said to have set into our law a principle, this case has done that.

Woods, C. J., dissenting in Bracey v. Darst, *supra*, said: "The statute only indirectly affects interstate commerce in the correction of an evil upon which Congres has not legislated. It relates to commercial transactions within the States and places the citizens of other States on equal footing wih the citizens of West Virginia."

But suppose that stocks are property distinct from the property of the corporation, are they property that is to be transported? Nothing may be transported but the certificates, and it is not the certificates which are the stock, but merely the evidence thereof. If a bill of exchange cannot be considered property transported, far less may stock be deemed such property.

The instant case says very forcibly, we think, that: "There can be no interstate commerce, unless as a part of the transaction there is in contemplation some act of transportation between two or more States. In this case the defendant was selling to a citizen of this State an obligation to make title to real estate in Georgia and upon compliance with the terms therein stated, to make title to a certain small lot of land in Georgia. There is nothing to be transported, either from this State to Georgia or from Georgia to this State." Could anything more aptly describe the non-transportable feature of a thing that was to be given in solution of a contract, whether one were to become entitled to stocks or bonds? If stock were to be given, as we have said, it is not necessary that certificates be sent. They are not stock. Stock is an interest in a thing and this interest exists independently of the issuance of the certificate. If one is to get a bond that differs from stock, only that it is more like a bill of exchange or an insurance policy. As we have seen these things have been held not subjects of interstate commerce.

The Federal cases rely on the lottery case mainly for their support (188 U. S. 21), but they overlook the fact that "a lottery ticket is a subject of traffic and *is so* designated in the Act of 1895." Could lottery tickets have been so considered independently of the statute so providing? The court does not so say. The dissent by four judges contended that a lottery ticket merely creates a contractual relation like an insurance policy as decided in Paul v. Virginia, which case was shown to be reaffirmed in 178 U. S. 389.

International Text Book Co. v. Pigg, 217 U. S. 91, was sustained, because it provided for shipment of what was contracted to be delivered. That this matter was information made no difference in its real nature. It strikes us as very extraordinary that these lower Federal courts have undertaken to strike down a statute aimed at fraud, when as to lottery tickets the Supreme Court held that it was necessary for Congress to legislate in regard to them directly. C.

CORRESPONDENCE.

A PROPOSITION FOR A SEVENTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Editor Central Law Journal:

"Congress shall have power to ordain and establish a United Court of Appeals, with such jurisdiction of appeal only from the highest court of every state not involving a federal

question, as may be provided by law. Said court shall have final jurisdiction of every cause, civil and criminal, decided in the highest court of every state within such limitations as may be provided by Congress."

Is the above constitutional amendment a fanciful dream? The lawyers of the United States are rapidly realizing that the burden of ascertaining what is the current of law from 48 separate courts of last resort is becoming almost intolerable. Baron Reading expressed his amazement at the task that confronts the American lawyer in endeavoring to ascertain what the law is in America out of a separate federal jurisdiction and 48 state jurisdictions. In many instances, we may cite with perfect confidence, the "federal doctrine," which is solidified and centralized by the decisions of the Supreme Court of the United States, but no one can tell on the same subject what the state doctrine is. A case of first impression comes up and California passes on it. That remains the current of the law until some other court passes on it. If Iowa takes the contrary view, the balance is even. If Missouri adopts the California theory, the weight of opinion is with California, and so it vibrates as each state considers the question. In the early days it was not so difficult. It was more like the strong, single current of the common law as we took it over. But as the litigation grows in the newer states, the difficulty of ascertaining multiplies in almost geometrical ratio.

It would be a waste of time to point out the increasing labor that confronts the American lawyer. Thus a point once thought settled, is disturbed by the new decisions of later courts. If such a constitutional amendment could be adopted, there would be one common law court that would pass upon every question not fixed by the particular statute of a state. We should have one Law Merchant for every state in the union. We should have one Law of Master and Servant where the state had not enacted an employers' liability act. The great body of common law, where not disturbed by statute, would be unified, restored to what it was when it crossed to our shores.

One other consideration might be urged. Such a court, appellate from 48 supreme courts, would be of equal rank and dignity with the present Supreme Court of the United States. It would draw to its service the ablest lawyers from all of those states. It would eradicate the idiosyncrasies born of the fluctuations in the different states and solidify the entire body of common law in the United States to one common expression. It would take time to do this. It would not help us older lawyers much, but I think that in twenty-five years the first recourse of the lawyer would be to the decisions of this United Court of Appeals. If that court had passed upon it, it would be the law from Florida to Alaska. No need to look further. If it had not, we would resort to the old, back-breaking process of trying to find the "weight of authority." Unless something of this sort is done, the burden of the American lawyer will become intolerable, the expense for law books alone will absorb his income.

As a matter of detail, this court might sit in circuit, the decision of the particular division to be final unless there was a disagreement. If there was a disagreement, an argument could be ordered in banc at Washington, but this would seldom occur. The great principle would be the principle of uniformity, the principle that the Interstate Commerce Commission has established in railroad rates.

Is the suggestion worth considering?

Respectfully yours,

F. DUMONT SMITH.

Hutchinson, Kans.

[ED. NOTE: Many practicing lawyers will be inclined to sympathize with Mr. Smith's diagnosis of present conditions in the field of legal research, although all may not be equally enthusiastic as to the remedy proposed. There is a strong undercurrent of opposition against extending federal jurisdiction over matters of purely local concern and this opposition must be met.

The commissioners on Uniform State Laws are trying to solve the same problem by codifying the more important subjects of law and urging their adoption in all the states. It must be admitted that this plan has not worked successfully for at least two reasons. First, all the states have not adopted all the uniform laws; secondly, even when, as with the Negotiable Instruments Law, there is general acquiescence in the work of the Commission, the courts of the several states have not been persuaded to surrender their own views of construction in favor of a construction that will supply the desideratum of uniformity.

Our own personal views lead us to look for relief in the direction of thorough codification by each state, which will largely eliminate the influence of foreign precedents. And if such codification can be made uniform, our anticipations will have been realized unless variant construction interferes.—EDITOR.]

BOOK REVIEW.

MC BAIN'S THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE.

Mr. Howard Lee McBain, Associate Professor of Municipal Science and Administration in Columbia University, writes a most interesting book on the general subject of Home Rule for cities. He speaks of the term "Municipal Home Rule" as a descriptive term of somewhat vague import. In its restrictive sense and as the courts generally employ the term is meant the conferring of power on cities by constitutions, the right to frame and adopt their own charters. He speaks of vesting of powers giving use to numerous and difficult questions and their abundance already constitute a distinct and important branch of state and constitutional law, and the time has arrived when it ought to be reviewed and subjected to critical analysis.

In the work there is traced the resemblance in our federal system, creating "home rule" for states and the creation of home rule for cities in a state, saying there cannot be urged the same economic reasons for the former as the latter. Of course, federal "home rule" has its restrictions, and city home rule has restrictions which he deems often arbitrary and as imposed without any clear perception of their limitations and are frequently unwise.

The work is a thoughtful study of conditions and the working out of home rule provisions in different states. The book aims to present "in convenient form a fairly comprehensive review of the actual experience of the state in which cities have enjoyed the right to frame and adopt their own charters," and then the general question may be considered independently of smooth and general views on such an important subject.

This work is in one volume, bound in cloth, of some 700 pages, presented in good type and paper and issues from Columbia University Press, 1916, New York.

HUMOR OF THE LAW.

The West Publishing Company's need for a "sporting editor," which it advertises in a recent issue of "The Docket" is made apparent even to the casual reader by its reference to Jack O'Connor as "captain of the St. Louis Cardinals," when every "rooter" in the country knew O'Connor as manager of the inglorious "St. Louis Browns." This unfortunate "break" occurred while the "Docket" was reporting the recent case of O'Connor v. American League Baseball Co., 181 S. W. 1167. We sympathize with the "Docket's" editor but offer in extenuation that, living out in the "brush," he cannot be expected to know all the fine points of major league baseball.

A congressman received almost daily letters from a constituent asking for garden seed, with emphasis on peas. The demand for peas got so heavy that the congressman was moved to write this letter:

"I am sending you a half dozen more packages of peas as requested. Say, what are you trying to do down there, plant the whole State in peas?"

The reply came a few days later. It read:

"No, I'm not planting them, but they make bully soup. Send along some more."

Little Nelly told little Anita what she termed a "little fib."

Anita—"A fib is the same as a story, and a story is the same as a lie."

Nelly—"No, it's not."

Anita—"Yes, it is, because my father said so, and my father is a professor at the university."

Nelly—"I don't care if he is. My father is a lawyer and he knows more about lying than your father."—Kansas City Star.

"Don't you envy the opportunities that great wealth affords?"

"Well," replied the philosopher in overalls, "of course, I'd like the limousines and private yachts, but I don't care so much for the alimony arguments and writs of habeas corpus."—Washington Star.

What the case was about no one seemed to know exactly. The lawyers themselves were pretty well mixed up.

Then an important witness entered the box and was presently asked to tell the court the total of his gross income.

He refused; the counsel appealed to the judge.

"You must answer the question," said the judge sternly.

The witness fidgeted about and then burst out with:

"But—but, your Honor, I have no gross income. I'm a fisherman, and it's all net."—St. Louis Post-Dispatch.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Action**—Joinder.—All of several railroads, separately entitled to action to enjoin the bringing of a multitude of suits against it for a statutory penalty, could join as complainants in one suit.—Guice v. Illinois Cent. R. Co., Miss., 71 So. 259.

2. **Alteration of Instruments**—Filling Blanks.—The makers of a note, other than the one for whose benefit it was made, by entrusting it to him with the date "July —" gave him implied authority to fill it "September 1," when he found a lender, and actually delivered it, so that was not an alteration.—Holland v. Higgins, Tenn., 183 S. W. 1008.

3. **Bankruptcy**—Assignment.—Where assignment of corporate stock as security was executed before amendment of June 25, 1910, to Bankruptcy Act July 1, 1898, though it be void as to creditors for want of recordation, trustee in bankruptcy is bound as bankrupt was.—Martin v. Bankers' Trust Co., Ariz., 156 Pac. 87.

4.——Equitable Property.—Under trust to pay net income to beneficiary for life, free from interference of creditors, beneficiary's interest held not to pass to trustee under Bankr. Act, § 70a, (5), where local law treated such restrictions against interference as limiting character of the equitable property and inherent in it.—Eaton v. Boston Safe Deposit & Trust Co., U. S. Sup. Ct., 36 S. Ct. 391.

5.——Jurisdiction.—Bankruptcy proceedings in which there has been no adjudication or appointment of receiver do not deprive state court of jurisdiction of general creditors' bill.—Morgan Bros. v. Dayton Coal & Iron Co., Tenn., 183 S. W. 1019.

6.——Practice.—Under Bankr. Act, §§ 3d, 7, 21a, 59f, where action on creditor's petition for leave to defend after adjudication was refused until he appeared for examination, held that this condition was prematurely imposed.—Abbott v. Wauchula Mfg. & Timber Co., U. S. C. C. A., 229 Fed. 677.

7.——Preference.—Recording of conveyance held not "required" by law within Bankr. Act, § 60a, as amended by Act Feb. 5, 1903, and section 60b as amended by Act June 25, 1910, as to avoidance of preferential transfers recorded within four months, where under Gen. Code Ohio, § 8543, failure to record does not render it invalid as to creditors.—Carey v. Donohue, U. S. Sup. Ct., 36 Sup. Ct. 386.

8. **Banks and Banking**—Forgery.—Independently of, as well as under, Negotiable Instruments Act, §§ 23, 65, a bank is not liable, where an agent of a depositor, authorized to draw and issue checks, forges the names of payees, and then cashes the checks.—Litchfield Shuttle Co. v. Cumberland Valley Nat. Bank, Tenn., 183 S. W. 1006.

9.——Misappropriation.—An administrator or other trustee may deposit trust funds in bank to his personal account and check them out in the usual course of business, and the bank, though knowing the character of the funds, is not liable to the beneficial owners, in the absence of knowledge of misappropriation.—Miami County Bank v. State, Ind. App., 112 N. E. 40.

10. **Bills and Notes**—Defenses.—In an action on a note, fraud and want of consideration are affirmative defenses which must be established by defendant by clear and convincing proof.—Hurley v. Wilky, Ariz., 156 Pac. 83.

11.——Future Promises.—Statements of an agent of a corporation that its stock was worth more than it had been when purchased by defendant, by which defendant was induced to renew his note given for the price, were not mere future promises.—Madison Trust Co. v. Stahlman, Tenn., 183 S. W. 1012.

12.——Holder for Value.—Where a bank purchased a note with no knowledge of defenses, though it had knowledge of facts that would have raised a suspicion in the mind of a person of ordinary prudence, and put him on inquiry, and was negligent in failing to make investigation, such bank was not a holder in due course.—Boxell v. Bright Nat. Bank of Flora, Ind., 112 N. E. 3.

13. **Bridges**—Notice of Defects.—Mere knowledge of defects in bridge would not bar plaintiff's recovery for negligence, if he was exercising ordinary care to avoid it.—Gabbert v. Union Depot Bridge & Terminal Ry. Co., Mo. App., 183 S. W. 673.

14. **Brokers**—Dual Agency.—An attorney, employed to secure a loan, being engaged in making other loans for the lender, is the agent both of borrower and of lender.—Mayfield v. British & American Mortgage Co., S. C., 88 S. E. 370.

15. **Building and Loan Associations**—Public Policy.—Where a building and loan association makes a contract germane to the purpose of its formation and not violative of its charter, public policy or any statute, and thereby induces a party relying on it to expend money and perform his part, it is liable.—Southwestern Surety Ins. Co. v. Davis, Okla., 156 Pac. 213.

16. **Carriers of Goods**—Common Carrier.—The operator of an incline for hire, who undertook to carry the cargoes of all vessels plying the river up the incline to the cars of a railroad company, was a "common carrier."—Joest v. Clarendon & Rosedale Packet Co., Ark., 183 S. W. 759.

17.——Consignee.—Consignor is entitled to recover for delay in shipment or for loss or injury to goods, though title passed to consignee on delivery to carrier.—Norfolk Southern R. Co. v. Norfolk Truckers' Exchange, Va., 88 S. E. 318.

18. **Carriers of Live Stock**—Limitation of Value.—Under provision in contract that carrier's liability was limited to valuation declared by shipper of cattle and that the rate

charged was based on such valuation, the measure of damages was the amount of actual damages from the carrier's negligence, in no case to exceed the sum stipulated.—Greening v. Chicago & N. W. Ry. Co., Mo. App., 183 S. W. 1121.

19. **Carriers of Passengers** — Alighting.—Where injuries to plaintiff while alighting from defendant's car resulted from his weight, and the result would have been the same regardless of the height of the step, there could be no recovery.—Portland Ry., Light & Power Co., Ore., 156 Pac. 266.

20.——Negligence.—An elevator passenger has only to show that he was injured by the rapid descent and sudden stopping of the elevator under the control of defendant, to make out case presumptively showing negligence.—Worden v. Central Fireproof Bldg. Co., Cal., 155 Pac. 839.

21.——Ordinary Care.—Owner of building provided with an elevator for the use of persons generally must exercise the same degree of care imposed upon common carriers.—Monahan v. Equitable Life Ins. Co. of Iowa, Iowa, 156 N. W. 994.

22.——Regulations.—It is a reasonable rule for a street railroad to require its passengers personally to deposit the fare in a coin and ticket collection box before entering the car when such regulation is intended to facilitate traffic.—Virginia Ry. & Power Co. v. O'Flaherty, Va., 88 S. E. 312.

23.——Street Railways.—The defendant street railroad was not liable as an employer for injuries to a passenger caused by two of its servants in uniform, but not on duty or in its pay, and on their own business in its terminal station.—Langley v. Boston Elevated Ry. Co., Mass., 112 N. E. 79.

24. **Chattel Mortgages**—Fraud.—A mortgage upon merchandise with possession and right to continue business reserved to mortgagor, is fraudulent and void.—Morgan Bros. v. Dayton Coal & Iron Co., Tenn., 182 S. W. 1019.

25. **Commerce**—Employe.—A carpenter, killed while repairing a railroad pump house and pumping station used in interstate commerce, was engaged therein.—Newkirk v. Pryor, Mo. App., 183 S. W. 682.

26.——Licenses.—License taxes upon those selling dairy goods, etc., imposed by a city are not invalid as to an interstate dealer who brings his goods from an adjoining state, though some of his business be interstate commerce, where he carries on such occupation within the state. —City of Newport v. French Bros.-Bauer Co., Ky., 183 S. W. 532.

27.——Shipment.—Where horses subject to a stop-over privilege in the state to load others were shipped to a point in a foreign state, the transaction was interstate commerce, regardless of whether a through bill of lading was issued. —Conley v. Chicago, B. & Q. R. Co., Mo. App., 183 S. W. 1111.

28.——State Tax.—The delivery of coupons, etc., redeemable in premiums in connection with retail sales of merchandise, held not interstate commerce so as to be protected against imposition of state license tax, though coupons are inserted in the retail packages, and are redeemable, outside of the state.—Rast v. Van Deman & Lewis Co., U. S. Sup. Ct., 36 Sup. Ct. 370.

29. **Conspiracy**—Evidence.—In a prosecution for conspiracy to attempt to obtain money by a confidence game, a blackboard, telephone and telegraph instruments, and electric bells and wires taken from defendants, are admissible as relevant, being tools ordinarily used in staging a "fake" horse race.—West v. People, Colo., 156 Pac. 137.

30. **Constitutional Law** — Contempt.—Where an attorney, charged with contempt by having interfered with the orders of a municipal court in the administration of justice, was apprised by the information of the nature of the charge and the facts he was called upon to explain, deny or justify, and he admitted such facts, the court finding him guilty on his own answer, there was no denial of due process of law.—People v. Seymour, Ill., 111 N. E. 1008.

31.——Jurisdiction.—Courts have no power to review legislative action exempting city property from taxation, though located in outside township, because of injustice or inequality of taxation.—Traverse City v. Blair Tp., Mich., 157 N. W. 81.

32.——License Fee.—Laws Fla. 1913, c. 6421, § 35, imposing additional license fee upon merchants offering coupons, etc., redeemable in premiums, does not unconstitutionally impair contract obligations; it not affecting sales completed before its enactment.—Rast v. Ven Deman & Lewis Co., U. S. Sup. Ct., 36 Sup. Ct. 370.

33. **Contracts** — Misrepresentation.—Plaintiff cotton oil company could not avoid its industrial contract agreement with defendant railroad by pleading misrepresentations as to the legal effect of its exemption clauses, as it had no right to rely on the statement as to what the legal effect of the contract would be.—Batesburg Cotton Oil Co. v. Southern Ry. Co., S. C., 88 S. E. 360.

34.——Substantial Performance.—That shortcomings of a building contractor were less than 10 per cent of the contract price does not establish substantial performance of the contract.—Witt v. Gilmour, N. Y. Sup. Ct., 158 N. Y. Sup. 41.

35. **Corporation**—Delegation of Power.—Even if for the term of its own existence a board of directors can delegate its powers involving discretion to a board of managers, it cannot do so for a period extending long beyond such term.—Shaw v. Bankers' Nat. Life Ins. Co., Ind. App., 112 N. E. 16.

36.——Dividend.—The word "dividend" refers to such profits as the directors by proper resolution have ordered distributed among the stockholders.—Knight v. Alamo Mfg. Co., Mich., 157 N. W. 24.

37.——Estoppel.—Where a corporate assignee attempted to enforce a contract for subscription to bonds, he cannot question the authority of the agent who made the contract so as to escape liability for agent's fraud.—Guaranty Trust Co. v. Dinwiddie, Ore., 156 Pac. 279.

38.——Implied Authority.—The general manager of a corporation whose authority is not expressly restricted has implied authority to sell a corporation's products.—Kitzmiller v. Pacific Coast & Norway Packing Co., Wash., 156 Pac. 17.

39.——Receiver.—That wrongful control and use of corporate stock equitably belonging to complainant, or in which he has a financial interest, excludes him from office or active participation in the management of the company, does not in itself justify the appointment of a receiver.—Murray v. Keeley Institute of West Michigan, Mich., 157 N. W. 87.

40.——Stock Subscription.—Subscribers to the stock of a corporation which failed substantially to comply with the statutes regulating incorporation are individually liable for the debts of the organization.—Meyer v. Brunson, S. C., 88 S. E. 359.

41. **Covenant**—Breach.—The mere existence of an outstanding prior deed of trust constitutes a breach of the covenant against incumbrances in a vendor's deed, entitling the grantee in possession to recover nominal damages.—Dudley v. Waldrop, Mo. App., 183 S. W. 1095.

42. **Damages**—Eminent Domain.—Owners of adjacent land, no part of which is condemned for railroad, are not entitled to consequential damages necessarily incident to operation, such as noises, vibrations, smoke, and sparks, and shared generally by all within range of railroad. —Lewisburg & N. R. Co. v. Hinds, Tenn., 183 S. W. 985.

43. **Dedication**—Acceptance.—Dedication of a street or alley to the public may be by marking on plat or on the ground, no municipal act of acceptance being required, and continued public use being sufficient.—Minium v. Solel, Mo., 183 S. W. 1037.

44. **Divorce**—Evidence.—Evidence as to the misconduct of a wife subsequent to a divorce decree set aside on her motion is admissible to

corroborate evidence of her previous misconduct.—Nolley v. Nolley, Ark., 183 S. W. 954.

45.——Habitual Drunkenness.—Evidence that the husband got on a protracted spree just before separation, and also that he had been drunk occasionally since marriage, was insufficient to establish the statutory ground of habitual drunkenness for a period of one year.—Williams v. Williams, Ark., 183 S. W. 960.

46. **Dower**—Antenuptial Contract.—Antenuptial contract held valid as a relinquishment of dower, though it provided for a payment to the wife on the husband's death, which was not made, his estate being insolvent, so that her dower right could not be asserted against a mortgagee, who had foreclosed his mortgage, made by the husband, in which she did not join.—Dickson v. English, Ill., 112 N. E. 65.

47. **Electricity**—Ordinary Care.—Use of third person's pole for mere convenience by lineman in stringing wire, without owner's knowledge or consent, does not impose duty on latter to exercise care for lineman's protection.—Mahaney v. City of Independence, Mo. App., 183 S. W. 1117.

48.——Trespass.—A city marshal who, attempting to remove from a passway a broken wire, received a death shock, held not a trespasser or meddler; for it was his duty to see streets and sidewalks were free of obstructions.—Sprinkles v. Missouri Public Utilities Co., Mo. App., 183 S. W. 1072.

49. **Eminent Domain**—Estoppel.—Payment of taxes on the same valuation after the building of a bridge which it was claimed injured land and failure to claim an abatement, does not estop the land-owner from contending that its property was damaged.—Brackett v. Commonwealth, Mass., 111 N. E. 1036.

50.——Public Use.—In condemnation of boom company's property not devoted to public use, such property is to be considered mere private property in fixing damages.—Washington Boom Co. v. Chehalis Boom Co., Wash., 156 Pac. 24.

51. **Estoppel**—Evidence.—Where insured relied on a non-waiver agreement with the insurers, he cannot take advantage of an oral statement made by his adjuster and assented to by the adjusters of the insurers which contracted the provisions of the policies preserved by the non-waiver agreement.—De Rossett Hat Co. v. London Lancashire Fire Ins. Co., Tenn., 183 S. W. 720.

52.——Evidence.—Representations by person desiring credit that he owned a piano in his house did not estop true owner, a roomer in the house, from claiming it as against creditor.—Farmers' Exchange v. Malody, Ariz., 156 Pac. 78.

53. **Executors and Administrators**—Administration.—An administrator taking charge of the personal property in another state and bringing it or its proceeds into this state, properly charged himself with it as a part of the personal estate to be administered according to the laws of this state.—Wyatt v. Wilhite, Mo. App., 183 S. W. 1107.

54.——Evidence.—Though a timber deed provides for payment for extension of time to the grantor and his personal representative, title having devolved on his heirs before the option was exercised, they are entitled to the payment.—Carolina Timber Co. v. Bryan, N. C., 88 S. E. 329.

55. **Homestead**—Separate Residence.—A person who built separate houses on two lots, one being occupied by himself and family, and the other by his tenant, could not claim the latter as part of his homestead.—Watson v. Manning, Okla., 156 Pac. 184.

56. **Insurance**—Assessments.—A stepdaughter paying the assessment of a mutual benefit certificate under oral promise that she should receive the proceeds was entitled to recover the assessments with interest from the insured's heirs, who received the benefit.—O'Brien v. Grand Lodge A. O. U. W. of Massachusetts, Mass., 111 N. E. 955.

57.——Chattel Mortgage.—Where a fire policy provides that it shall be void unless otherwise provided if the subject of insurance be personal property and be incumbered by chattel mortgage, execution of chattel mortgage on the property renders it void.—Georgia Home Ins. Co. v. Hoskins, Fla., 71 So. 285.

58.——Evidence.—Act of insured, upon transferring the property, in tendering back for cancellation the five-year policy, the first premium on which they had paid, and given their note for the four remaining installments, the first installment being more than the short rate for the time the policy had been in force, held to end their liability on the premium note.—Continental Ins. Co. v. Smith, Ind. App., 112 N. E. 15.

59.——Iron Safe Clause.—The purpose of an iron-safe clause was accomplished where insured produced data from which the value could be ascertained, and kept books showing the firm's business, though he failed to produce the books because they were destroyed by fire at a place where he had a right to keep them.—Dickey v. Springfield Fire & Marine Ins. Co. of Springfield, Mass., Okla., 156 Pac. 204.

60.——Waiver.—An insurer's waiver of one of the promissory covenants of a policy does not waive other conditions, unless it clearly appears that the parties so intended.—Bond v. National Fire Ins. Co., W. Va., 88 S. E. 389.

61. **Landlord and Tenant**—Waiver.—A covenant not to assign or underlet leased premises without the assent of the lessor's signature to a writing whereby the lessee company, its successors and assigns, might renew the lease at their option.—White v. Huber Drug Co., Mich., 157 N. W. 60.

62. **Libel and Slander**—Fair Comment.—Right of "fair comment" is limited to facts; mere belief in truth of publication being insufficient.—Patten v Harper's Weekly Corp., N. Y. Sup. Ct., 158 N. Y. Sup. 70.

63.——Fictitious Name.—That a libelous publication is contained in a novel does not exempt the libeler from liability, as the party libeled, by appropriate allegations, may connect himself with the libel in which he is named by a fictitious name, named not at all, or only indirectly referred to.—Corrigan v. Bobbs-Merrill Co., N. Y. Sup. Ct., 158 N. Y. Sup. 85.

64. **Licenses**—Police Power.—A reasonable vehicle license tax imposed by a city under the police power will not be held invalid because of a provision that the proceeds should be used for the repair of streets.—City of Newport v. French Bros. Bauer Co., Ky., 183 S. W. 532.

65. **Limitation of Actions**—Accrual of Action.—Where a railroad embankment impeded the flow during an unusual freshet, and caused water to back up on adjoining owner's lands, the owner's cause of action did not accrue until the injury was sustained.—Rogers v. Oregon-Washington R. & Nav. Co., Idaho, 156 Pac. 98.

66.——Nuisance. — While limitations run against action for permanent nuisance from its creation, where business is not a nuisance per se, successive actions may be brought, and in cases of doubt courts favor right to successive actions.—Portsmouth Cotton Oil Refining Corp. v. Richardson, Va., 88 S. E. 317.

67. **Literary Property**—Public Performance. The public performance of a play by the author confers no right to the play upon the manager of the theater in which it was performed.—O'Neill v. General Film Co., N. Y. Sup. Ct., 157 N. Y. Sup. 1028.

68. **Livery Stable and Garage Keepers**—Negligence.—Where livery stable keepers let a mule team and driver to a contractor for haulage work, they were liable for any damages which the driver with the team inflicted by negligent and unskillful management thereof, whereby the contractor's property was damaged.—Foy-Proctor Co. v. Marshall & Thorn, Ky., 183 So. W. 940.

69. **Master and Servant** — Employment.—Where a contract was made in New York for the employment of plaintiffs on a vaudeville circuit on the Western Coast, the Coast, and not New York, was the place for tender of performance on the part of persons so engaged.—Amann v. Pantages, Wash., 155 Pac. 1070.

70.——Fellow Servant.—A vessel owner is liable for the failure of an injured employe's fellow servants to perform their duty to inspect the boilers.—Souden v. Fore River Shipbuilding Co., Mass., 112 N. E. 82.

71.——Interstate Commerce.—Evidence that railway employe killed in switching yard was taking numbers of cars in train which with one exception were moving in interstate commerce, held sufficient to take to the jury question whether he was engaged in interstate commerce.—Pecos & N. T. R. Co. v. Rosenbloom, U. S. Sup. Ct., 36 Sup. Ct. 390.

72.——Workmen's Compensation Act.—Under Workmen's Compensation Act the "intentional and willful misconduct" debarring an employe from the compensation which he might otherwise receive refers to such misconduct within the scope of his employment.—Bischoff v. American Car & Foundry Co., Mich., 157 N. W. 34.

73.——Workmen's Compensation Act.—Paralysis resulting from rupture of blood vessel from heat and overexertion by employe having arterial sclerosis is "accident" within Workmen's Compensation Act.—La Veck v. Parke, Davis & Co., Mich., 157 N. W. 72.

74. **Mines and Minerals**—Mortgage.—There was no valid delivery of a mortgage and note surrendered to the mortgagee on condition that the property which the mortgagor was buying proved satisfactory on inspection.—Simmons v. Meyers, Ind. App., 112 N. E. 31.

75. **Mortgages**—Deed.—A deed by the buyers of land back to the seller, and his contract to reconvey upon payment of the price, may be executed under such circumstances that they will not constitute a mortgage.—Baldwin v. McDonald, Wyo., 156 Pac. 27.

76.——Lien.—Where one who had mortgaged chattels and agreed to replace the mortgage with one executed by himself and wife used the property to secure a loan to complete payment of a farm, promising to give the lender a mortgage on the farm executed by himself and wife, but gave a mortgage not acknowledged and signed only by himself, though his wife enjoyed the fruits of the exchange of security, held that, as between the parties the land was subject to the lien.—English v. Sanborn, Kan., 155 Pac. 1079.

77. **Municipal Corporations**—Laches.—Where a municipal corporation was alleged to be illegally formed by including plaintiff's lands within its limits, it was material on question of his laches in asserting such illegality, when the effort to assess taxes against the property was made; that being the first assertion of corporate authority over his lands.—State on Inf. of Bates ex rel. Center Creek Mining Co. v. City of Carterville, Mo. App., 183 S. W. 1093.

78.——Ordinance.—In the absence of evidence to the contrary, the Supreme Court, on appeal from a conviction of violating an ordinance regulating the jitney business and requiring indemnity bond, will assume the existence of conditions requiring the enactment of such ordinance.—City of New Orleans v. Le Blanc, La., 71 So. 248.

79.——Special Assessment.—The city council having power to make the settlement made for constructing a local improvement, any issuance of warrants before claims were approved by the council was merely an irregularity merged in the final award.—McGillivrae v. City of Bremerton, Wash., 156 Pac. 23.

80. **Negligence**—Imputability.—There can be no recovery for the death of a woman when the automobile in which she was riding with her husband was struck at a grade crossing, where she trusted to her husband for safety and he was negligent.—Fogg v. New York, N. H. & H. R. R., Mass., 111 N. E. 960.

81. **Novation**—Evidence.—A contract between two parties that one should pay a third person a sum for which they were separately liable in equal parts, held not to create a novation unless and until sanctioned by the third person.—Nelson v. Nelson, Neb., 156 N. W. 1036.

82. **Physician and Surgeon**—Evidence.—Whether a physician and surgeon possessed and exercised the requisite degree of skill and learning in treating plaintiff, was for the jury, though the expert testimony was conflicting as to the approved method of treatment.—McAlinden v. St. Maries Hospital Ass'n, Idaho, 156 Pac. 115.

83. **Principal and Agent**—Commercial Surety.—Where a commercial surety received payment of the premium after its principal had defaulted, though it had knowledge of that fact, a mere extension of time to the principal will not release the surety.—State Agricultural & Mechanical Soc. of South Carolina v. Taylor, S. C., 88 S. E. 372.

84. **Principal and Surety**—Suretyship.—Each of two sureties owes the entire debt to the creditor, but as between themselves each owes one-half of the debt.—Singleton v. Shepherd, Mo. App., 183 S. W. 1077.

85. **Railroads**—Contributory Negligence. — A sane adult with no infirmities, who uses a railroad track as a pathway and remains or walks upon it until struck by a passing train, is guilty of contributory negligence.—Wexel v. Grand Rapids & I. Ry. Co., Mich., 157 N. W. 15.

86.——Crossing Accident.—One attempting to cross a railroad track at a crossing who looks for a train is not negligent because he does not look in the right direction at the precise time and place when and where looking would have been of the most advantage.—Baker v. Baltimore & O. S. W. R. Co., Ind. App., 112 N. E. 27.

87.——Crossing Accident.—That chauffeur killed at crossing was carrying passenger to whom he owed highest care did not affect duty to use only ordinary care for own safety as between himself and defendant railway in action for death.—Southern Ry. Co. v. Vaughan's Adm'r, Va., 88 S. E. 305.

88.——Right of Way.—A railroad right of way is an "interest in land."—Stuart v. Colorado Eastern R. Co., Colo., 156 Pac. 152.

89.——Sudden Peril.—The rule, excusing acts by a traveler when confronted with peril at a grade crossing, canot be invoked in favor of one whose own negligence placed him in peril.—Fogg v. New York, N. H. & H. R. R., Mass., 111 N. E. 960.

90. **Release**—Evidence.—Telephone lineman's settlement with employer, whereby he agreed not to sue his employer, held not discharge of right of action against defendant city, whose uninsulated light wire caused injury.—Mahaney v. City of Independence, Mo. App., 183 S. W. 1117.

91. **Removal of Causes**—Several Action.—Where action to quiet title, brought in state court against defendant, a domestic resident railroad, was on the motion of the non-resident co-defendant alone removed into the federal court, the cause was severable, and its removal left the cause against the resident railroad in the state court.—Stuart v. Colorado Eastern R. Co., Colo., 156 Pac. 152.

92. **Sales**—Implied Warranty.—Where a dealer in pumps sold grading contractors a new impeller for a second-hand pump originally purchased from the dealer, there was no implied warranty that the new impeller would make the old pump work satisfactorily.—Perine Machinery Co. v. Buck, Wash., 156 Pac. 20.

93.——Representations.—Statement of plaintiff's agent, on obtaining defendant's order for carload of imported beer, that plaintiff was selling 18 cars there annually, and that under the contract defendant, as plaintiff's distributor, would handle 18 cars annually, held representations of existing facts, and not opinions.—Luchow v. Kansas City Breweries Co., Mo. App., 183 S. W. 1123.

94.——Rescission.—Mere breach of warranty on sale of automobile would not authorize rescission by buyer alone.—Rimmele v. Huebner, Mich., 157 N. W. 10.

95. **Specific Performance**—Equity.—It is presumed that breach of agreement to transfer land cannot be adequately relieved by pecuniary compensation, and ordinarily a court of equity will enforce specific performance.—Orfield v. Harney, N. D., 157 N. W. 124.

96.——Evidence.—Specific performance will not be decreed unless the court can, at the time, enforce the whole contract on both sides,

or such part of it as the court can ever be called upon to enforce.—Bilansky v. Hogan, Mich., 157 N. W. 13.

97. **Statutes** — Constitutional Law.—Wh'le English cases are not direct authority on constitutional questions, they may be recognized in construing a statute adopted from the English law.—Grand Rapids Lumber Co. v. Blair, Mich., 157 N. W. 29.

98. **Street Railroads**—Legislative Authority. —While streets may be used by the public for ordinary traffic, the construction of a railroad or street railroad thereupon does not fall within such rights and must be authorized by the Legislature as one of the prerogatives of sovereignty.—People ex rel. City of New York v. New York Rys. Co., N. Y., 112 N. E. 49, 217 N. Y. 310.

99.——Ordinary Care.—One about to cross a street in front of an approaching street car must use his faculties, and cannot rely upon the operator's compliance with the speed laws.—Starck v. Pacific Electric Co., Cal., 156 Pac. 51.

100. **Taxation** — Exemptions. — Exemptions from taxation will not be allowed, unless it clearly appears that such was the statutory intent; every reasonable doubt being resolved in favor of the taxing power.—Alaska Northern Ry. Co. v. Municipality of Seward, U. S. C. C. A., 229 Fed. 667.

101.——Quieting Title.—Title cannot be quieted in one party without reimbursement of another for taxes paid on the land, which he claimed under quitclaim deed from the tax sale purchaser.—Harty v. Glos, Ill., 112 N. E. 74.

102.——Recovery Back.—Payment of taxes on assessment by board of supervisors pending appeal to quarterly court cannot be recovered back.—Commonwealth v. Southern Pac. Co., Ky., 183 S. W. 925.

103. **Telegraphs and Telephones** — Arrears for Rent.—Where a contract for telephone service provided that by paying an additional fee, a subscriber could pay his quarterly rental during the second instead of the first month, the subscriber was not in arrears at the time of removal of the phone during the first month.—Harbaugh v. Citizens' Telephone Co., Mich., 157 N. W. 32.

104.——Negligence.—Failure of a telegraph company to deliver a dispatch for an hour and a half after its receipt, held evidence of negligence.—Lawrence v. Western Union Telegraph Co., N. C., 88 S. E. 226.

105. **Trade-Marks and Trade-Names**—Territorial Limitation.—First appropriator of words as a trade-mark for flour by confining his use thereof to certain territory, so that his flour was wholly unknown in the Southeastern States under the trade-mark, held to lose right to enjoin use of the trade-mark by another manufacturer who in good faith had built up an extensive trade in those states so that the trade-mark had come to mean its flour.—Hanover Star Milling Co. v. Metcalf, U. S. Sup. Ct., 36 Sup. Ct. 357.

106.——Unfair Competition.—To warrant a recovery for unfair competition, it must be shown that the dress of the two articles is so similar as to probably deceive the purchasing public while in the exercise of reasonable care. —Goldsmith Silver Co. v. Savage, U. S. C. C. A., 229 Fed. 623.

107. **Trespass**—Damages.—One who willfully and intentionally takes property from the land of another must respond in damages for the full value of the property taken at the time of the conversion, without any deduction for the labor bestowed or expense incurred in removing and preparing it for the market.—Bryson v. Crown Oil Co., Ind., 112 N. E. 1.

108.——Inclosure.—House on inclosed land is within statute making it misdemeanor to enter or pass over inclosed lands after being personally forbidden by person entitled to possession or by his authorized agent.—Poole v. State, Ga. App., 88 S. E. 411.

109. **Trover and Conversion**—Special Value. —In case of the destruction or conversion of property of special value as heirlooms, the owner cannot recover the special value as well as the market value of such property.—Shewalter v. Wood, Mo. App., 183 S. W. 1127.

110. **Trusts** — Misconduct. — The trustee's property is not liable to the beneficiary, where no violation of the trust by neglect or misconduct is shown.—Clark v. Spanley, Ark., 183 S. W. 964.

111. **Usury**—Statute.—The borrower can be required to pay a reasonable attorney's fee, for preparing abstract of title for the property to secure the loan, without violation of the statutes against usury.—Mayfield v. British & American Mortgage Co., S. C., 88 S. E. 370.

112. **Vagrancy**—Evidence.—Conviction of vagrancy is unsupported when there is no proof that accused was able to work nor that he did have means ample for his support.—Elders v. State, Ga. App., 88 S. T. 414.

113. **Vendor and Purchaser**—Notice.—Purchasers of land with knowledge that another, then at hand, claims some interest therein, are charged with all knowledge they could have had for the asking.—Walker v. Taylor, S. C., 88 S. E. 300.

114.——Tenancy by Entirety.—Vendor of lands to tenants by the entireties, the husband executing his note for the price, which is unpaid, or the wife paying a part of the consideration and the husband giving his note for the balance, which remains unpaid, the wife being chargeable with knowledge of the facts, can enforce his lien against the lands.—Simmons v. Meyers, Ind. App., 112 N. E. 31.

115.——Waiver.—Where the contract entitled the vendor to declare a forfeiture for nonpayment, the purchaser's statement after default, but before expiration of additional time given him, that he could not complete the purchase excused formal tender of a deed.—Drollinger v. Carson, Kan., 155 Pac. 923.

116. **Waters and Water Courses**—Pollution. —In action for pollution of stream, special damages, such as diminution of rental value, cannot be proved, unless pleaded.—Portsmouth Cotton Oil Refining Corp. v. Richardson, Va., 88 S. E. 317.

117.——Prior Appropriation.—Senior appropriator cannot enlarge use of water to injury of vested rights of juniors though enlarged use does not go beyond decreed amount. —Ft. Collins Milling & Elevator Co. v. Larimer & Weld Irr. Co., Colo., 156 Pac. 140.

118.——Riparian Owner.—Where a railroad embankment impedes the flow of a river during an unusual freshet and causes water to back upon adjoining land of a riparian owner, such owner may recover actual damages thereby suffered.—Rogers v. Oregon-Washington R. & Nav. Co., Idaho, 156 Pac. 98.

119. **Wills**—Construction.—On gift in trust and upon death of life tenant without issue over to the survivors of seven named cousins, and to the issue of any deceased, the death of all the cousins before the death of the life tenant without issue eliminated and absolutely destroyed any interests of the cousins, and the remainder passed to the living issue of those who had not died childless.—Buist v. Walton, S. C., 88 S. E. 357.

120.——Heirs of Body.—The words "heirs of the body" mean all lineal descendants, to the remotest posterity, unless the instrument shows they were used in a restricted sense, as to indicate "children."—Pearson v. Easterling, S. C., 88 S. E. 376.

121.——Transfer Tax. — That grandchildren might thereby take under their grandfather's will and defeat transfer tax instead of under power of appointment, held not sufficiently convincing reason for construing "children" to include grandchildren.—In re King's Estate, N. Y., 111 N. E. 1060.

122. **Work and Labor**—Express Contract.— Though plaintiff can recover only on an express contract where there is one and cannot resort to an implied one, yet where an express contract has been fully performed, only payment in money remaining to be done, he can recover either under the common counts, a special count based on the express contract, or both. —Dunaway v. Roden, Ala. App., 71 So. 70.